No. 12,062

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT H. GAULDEN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY and PACIFIC FRUIT EXPRESS COMPANY,

Appellees.

APPELLEES' BRIEF

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I.

PRELIMINARY STATEMENT

Gaulden, an employee of Pacific Fruit Express Company, was injured while working for PFE[1] at its Bakers-

1. The corporate parties involved are hereafter referred to, as they are referred to in the record, by their familiar initial designations, PFE for Pacific Fruit Express Company, SP for Southern Pacific Company and UP for Union Pacific Railroad Company.

field plant, unloading ice from railroad cars.[2] The pleadings show that he was paid and received compensation under the California Workmen's Compensation Act.[3] He is now attempting to collect under the Federal Employers' Liability Act. On the face of his complaint, and in the proceedings so far had, neither he nor his counsel is quite clear how this can be done. The complaint is a shotgun affair, fired broadside, in the hope that something will be hit. It alleges that each Southern Pacific Company and Pacific Fruit Express Company is a common carrier by railroad engaged in interstate commerce and that "plaintiff was employed by defendant, Southern Pacific Company *or* defendant Pacific Fruit Express Company *or* both of said defendants."

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2. "At the time he was injured plaintiff and other PFE employees were engaged in unloading PFE cars and plaintiff was injured as a result of the movement of said cars by plaintiff and other PFE employees." (R 51). The complaint alleges that he and other employees were moving certain refrigerator cars; that he was ordered behind a refrigerator car "that had been unloaded" to aid the movement of the car by pushing it; that it was to be moved in connection with another car which was moved by a rope and winch; that this other car was loaded with ice; that while plaintiff was pushing the empty car he was run over by the loaded ice car (Complaint Paragraph VII, R 4). This can be taken as true only in so far as admitted in the answer. The admissions are in Part I of the first defense (R 9, 10). The answer admits that plaintiff was an iceman at the PFE ice plant at Bakersfield. "At said time and place plaintiff was engaged in unloading ice from certain refrigerator cars. In the course of said unloading, plaintiff assisted other employees of defendant Pacific Fruit Express Company in pushing a certain empty car, which had just been unloaded, so as to clear the unloading platform for the next car to be unloaded. The loaded car was being pulled up to the unloading platform by a cable and winch."

3. Fifth defense (R 12-14) and plaintiff's (Appellant's) Reply (R 16, 17) filed at the direction of the trial court (R 15).

The California Workmen's Compensation Act is now part of the California Labor Code, § 3201 et seq.

Defendants were served with interrogatories. Objections were filed and a pre-trial conference was had. On the claim of application of the Federal Employers' Liability Act there was a showing of facts and a stipulation. The Court approved the stipulation, made it a part of the order and provided that the order be the Court's order on pre-trial conference (R 19-24).

The stipulation provides that narrative statements attached to it (R 24-75) stand as answers to the interrogatories. They state at some length certain facts. Other facts are covered in Paragraph 3 of the stipulation,—primarily the question of interstate commerce if otherwise the Federal Employers' Liability Act applies. The stipulation provides:

> "The issue of application of the Federal Employers' Liability Act (* * *) shall be submitted to the Court for decision on pretrial conference, on the pleadings, this stipulation and the attached statements of fact (* * *) for disposition by the Court."[4]

The stipulation further provides: "if the Court determines that the Act does not apply it may make appropriate order and judgment disposing of the case," reserving to plaintiff an exception "if the Court holds that the Act does not apply, and judgment, accordingly, is entered for defendants." (R 22, 23).

The broad issue is whether there is some magic by which an employee of a "car company," which provides icing service to common carriers by railroad, because he is

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4. Paragraph 5 further provides that the matter in the narrative statements is deemed to have "been proved by appropriate documentary evidence or a witness competent and qualified to testify." (R 23).

dissatisfied with the California Workmen's Compensation Act, becomes an employee of a common carrier by railroad under the Federal Employers' Liability Act.

II.

STATEMENT AND DISPOSITION BELOW

The ultimate facts were determined by the trial court and are stated in its opinion. There is no claim now made of inaccuracy or significant omission. A discussion of every contention made by the plaintiff-appellant followed. Appellant does not attempt to meet it. Indeed, appellant hardly makes the claim that the considerations exposed by the court below do not dispose of this case. Certainly no claim is made that the propositions made are not fully supported by the cases. Rather, the attempt is a partial and inaccurate statement and the citation of cases (one of which at least was disapproved by the court that decided it) dealing with situations wholly different.

The opinion of the trial court is set out in the record at pages 75-87. It is reported in 78 F. Supp. 651. We could rest on it. We shall, however, to some extent amplify (1) to set out conveniently some detail and (2) to correct misimpressions which appellant's brief might convey, particularly of the terms of the contract between SP and UP on one hand and PFE on the other which appellant has "simplified" to the point of being misleading.

III.

ARGUMENT

A. The Issues.

Appellant would like to frame the issue. If you can state the question your way you have gone far to have it

decided your way. But the issue cannot be made by the parties. The Congress has made it.

The question is whether the Federal Employers' Liability Act applies. That Act has not left its application in the air. It provides:

> "Every *common carrier by railroad*" while engaged in interstate commerce shall be liable to any person injured "while he is *employed by such carrier* in such commerce, or, in case of the death of *such employee*" to designated beneficiaries.
>
> The basic issues must be:
>
> 1. Who is a "common carrier by railroad"?
> 2. Who is a person "employed by such carrier",—who is such an "employee"?

As used in the Federal Employers' Liability Act what does the language "common carrier by railroad," "employed" and "employee" mean?

B. Preliminary Propositions.

Some preliminary propositions will not be disputed:

Unless the Federal Employers' Liability Act applies appellant's only remedy was an application to the California Industrial Accident Commission under the Workmen's Compensation Act (Labor Code).

> *Moore v. C. & O. Ry. Co.,* 291 U.S. 205, 78 L.ed. 755;
>
> *Tipton v. Atchison etc. Co.,* 298 U.S. 141, 80 L.ed. 1091;
>
> *Scott v. Industrial Acc. Com.,* 9 Cal.2d 315, 70 P.2d 940. (Overruling earlier California cases).

Appellant had the burden of showing facts necessary for application of the Federal Employers' Liability Act. He

was aided by no presumption. He takes the risks of all "holes" in the case. What did not appear must be taken against him.

So. Pac. Co. v. Middleton, 54 Fed.2d 833 (C.C.A. 5);
Robinson v. B. & O. R. Co., 237 U.S. 84, 59 L.ed. 849;
Cent. Vermont R. Co. v. White, 238 U.S. 507, 59 L.ed. 1433;
Hull v. Phila. & R. R. Co., 252 U.S. 475, 64 L.ed. 670;
Johnson v. S. P. Co., 199 Cal. 126, 248 P. 501.

Plaintiff had the burden to show that a defendant against whom recovery was sought owned and operated a common carrier by railroad.

Bay v. Merrill & Ring Lumber Co., 211 Fed. 717, aff'd 220 Fed. 295 (C.C.A. 9), aff'd 243 U.S. 40, 61 L.ed. 580.

Appellant undertakes to ground one line of argument on a claim of the meaning and legal effect of a contract. There are rules for determining the meaning and effect of a contract by looking within it—considering the words, the relations of provisions to each other, etc. There are also two important external considerations, (1) the situation of the parties, the circumstances surrounding the making of the contract and the purpose to be served, and (2) the conduct of the parties under it—their "practical construction."

A contract is not a rootless abstraction. It is the agreement of living people to act in a concrete situation. The language is of first importance. But this is the language of the whole agreement, not selected portions in isolation.

The words are relative.[4a] The writing is only a series of symbols for sounds. The sounds have meaning only as usage has related them to things, actions or ideas. Their sense and meaning are not always the same.[4a] The language takes on sense and meaning only as it is known who the parties are, when and where they spoke, with what they were dealing, what problems and solutions presented themselves, and how the matter was ordinarily treated. Since no one knows better than the parties the intention of their language in its concrete application, their conduct, when there were no litigation and no contentions, must always be looked to and, often, is controlling.

"Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." (*North German Lloyd v. Guaranty Trust Co.,* 244 U.S. 12, 24, 61 L.ed. 960, 966). "In ascertaining the true meaning of instruments in writing, courts do not confine their attention to single words, phrases, or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals." (*Green County v. Quinlan,* 211 U.S. 582, 594, 53 L.ed. 335, 342; *O'Brien v. Miller,* 168 U.S. 287, 297, 42 L.ed. 469, 473[5]; *Chicago etc. Co. v. Denver etc. Co.,* below, quoted in note 11). "The rules of construction forbid seizing upon some isolated provision of a contract in

4a. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (Mr. Justice Holmes for the Court in *Towne v. Eisner,* 245 U.S. 418, 425, 62 L.ed. 372, 376.)

5. "The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

order to compel a certain result, and require that the intention be derived from a consideration of the entire instrument. (Civ. Cod., secs. 1641,[6] 1650.[7])'' (*Skookum Oil Co. v. Thomas,* 162 Cal. 539, 547, 123 P. 363; *Estate of Winslow,* 121 Cal. 92, 94, 53 P. 362[8]; *Burr v. Western States etc. Co.,* 211 Cal. 568, 296 P. 273; *Lemm v. Stillwater etc. Co.,* 217 Cal. 474, 19 P.2d 785; 2 *Williston, Contracts,* Rev. Ed., §618[9]).

''The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing, the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made.'' (*Sand Filtration Corp. v. Cowardin,* 213 U.S. 360, 364, 53 L.ed. 833, 835; *McCullough v. Virginia,* 172 U.S. 102, 112, 43 L.ed. 382, 386[10]; *Chicago etc. Co. v. Denver etc. Co.,* 143 U.S. 596,

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6. ''The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.''

7. ''Particular clauses of a contract are subordinate to its general intent.''

8. Among the rules controlling the interpretation of contracts ''are that the mutual intention of the parties will be given effect so far as the same is lawful and ascertainable from the language employed and the attendant circumstances; that each clause of the contract is to be looked to for light in interpreting the others''.

9. ''The writing will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose. The context and subject matter of a contract may show that in a particular sentence an ordinary word has an unusual meaning; or that a word whose meaning, taken by itself, is clear, has been inaccurately used.''

10. A contract, ''whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties.''

609, 36 L.ed. 277, 281[11]; 2 *Williston, Contracts,* Rev. Ed., §618[12]; *Cal. Civ. Cod.* §1647[13]; *Cal. C. C. P.* §1860[14]). Contracts "are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy." (*Harten v. Loffler,* 212 U.S. 397, 404, 53 L.ed. 568, 573). And so, in construction of a contract, "general words would be restrained by the particular occasion of using them" and "collateral facts and the circumstances in which the parties were placed when the agreement was made, may be given in evidence." (*The Troy etc. Factory v. Corning,* 14 How. 193, 214, 217, 14 L.ed. 383, 392, 393).

The *Harten Case* pointed out another consideration. Not only must the court look to the factual situation before and at the time the contract was made but it must consider what the parties have done under the contract. "Generally speaking, the practical interpretation of a contract by the

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11. "There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed."

12. "The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the contract at the time and place when the contract was made; and all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract."

13. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

14. "For the purpose of construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may always be shown, so that the Judge be placed in the position of those whose language he is to interpret."

parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." (*Old Colony Trust Co. v. Omaha,* 230 U.S. 100, 118, 57 L.ed. 1410, 1417, citing cases; *Dist. of Columbia v. Gallaher,* 124 U.S. 505, 510, 31 L.ed. 526, 527[15]; *Brookman etc. Co. v. Dutcher,* 95 U.S. 269, 24 L.ed. 410, 412[16]; *Rest., Contracts,* §235(e)[17]; 2 *Williston, Contracts,* Rev. Ed., §623[18]; *Cal. Civ. Cod.* §3535[19]; *Long Beach v. United Drug Co.,* 13 Cal.2d 158, 166, 88 P.2d 698[20]; *Union Sugar Co. v. Hollister Estate Co.,* 3 C.2d 740,

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15. "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a reduction in the contract price."

16. "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but hardly less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

17. "If the conduct of the parties subsequent to a manifestation of the intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

18. "The interpretation given by the parties themselves to the contract as shown by their acts, will be adopted by the court, and to this end not only the acts, but the declarations of the parties may be considered."

19. States that "contemporaneous exposition is in general the best."

20. "Moreover, the construction placed upon the instrument by the parties themselves is persuasive; the law recognizes that the practical construction made by them is cogent evidence of what they intended (citing cases)."

754, 47 P.2d 273[21]; *Lemm v. Stillwater etc. Co.,* above[22]; *Preston v. Herminghaus,* 211 Cal. 1, 11, 292 P. 953; *Woodard v. Glenwood Lumber Co.,* 171 Cal. 513, 153 P. 951.)

C. The Facts.

1. SP and UP were disassociated common carriers by railroad[23] (R 24, 25). The general extent of their lines and the general character of their business are matters appropriate for judicial notice[24] (*Ohio Bell T. Co. v. P. U. Com'n.,* 301 U.S. 292, 301, 81 L.ed. 1093, 1100; *Muller v. Oregon,* 208 U.S. 412, 420, 52 L.ed. 551, 555; *Davis v. Farmers etc. Co.,* 262 U.S. 312, 67 L.ed. 996, 998; *Terminal R. Ass'n v. Kimbrel,* 105 F.2d 262 (C.C.A. 8); *Varcoe v. Lee,* 180 Cal. 338.)

SP and UP, together with more than 400 other common carriers by railroad in the United States, provided common carrier by railroad service for the transportation of

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21. Where there was a dispute as to the meaning of a contract the "contemporaneous construction by the parties may be resorted to as the best means of solution."

22. "In viewing the surrounding circumstances of the situation of the parties the court may also call to its aid the event subsequent to the execution of the contract, particularly the practical construction given to the contract by the parties themselves, as shedding light upon the question of their mutual intention at the time of contracting."

23. As will appear below SP and UP were parties to a single contract with PFE. No other relationship between them appears. SP owned no stock of UP and UP was not the owner of record of any stock of SP. If it had any beneficial interest in any stock standing in any other name it was less than 1/10 of 1% of the stock of SP. SP and UP had no common officers or directors (R 25).

24. Both, as common carriers by railroad, were engaged in interstate commerce, subject to the Interstate Commerce Act, its amendments, acts supplementary thereto and acts *in pari materia* therewith and subject to the jurisdiction of the Interstate Commerce Commission (R 24, 25).

"perishables"[25] and in connection with that service made available "protective service" to protect the perishables against the adverse effect of climatic changes or natural deterioration.[26] For this special cars, commonly called reefers,[26] were used and cooling, ventilation or heating service was provided[27] (R 35 et seq.). PFE was one of a number of corporations providing such protective service for American rail carriers.

Under the Interstate Commerce Act (49 U.S.C.A. §6) every common carrier was required to file, print, and keep open "schedules showing all the rates, fares and charges for transportation." These schedules were required to show, among other things, "all terminal charges, storage charges, icing charges,[28] and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise shall effect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of

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25. "Perishables" are commodities subject to being adversely affected by heat or by cold or by changes in temperature or by natural deterioration unless kept cold (R 35).

26. "Protective service" is a service designed to protect perishables from deterioration due to temperature or natural deterioration and is provided by supplying heater service, ventilator service, and icing and refrigeration service in especially designed and built cars. The commonest type of car was the standard refrigerator car. For this reason these cars are known as "reefers." (R 35, 37, 43).

27. Neither SP nor UP undertook at any time to provide this service through its own forces and facilities but both before and after the commencement of business by PFE provided such service to others. Before PFE was organized and began business in 1907 they provided this service through contact with third persons. After PFE was organized they provided this service through contact with PFE (R 25).

28. Certain statutes more particularly dealing with protective service are noticed below at pp. 29 et seq.

the service." In addition it was provided that "no carrier * * * shall engage or participate in the transportation of * * * property * * * unless the rates, fares and charges" have been so filed and published, nor shall any carrier collect or receive greater or less or different compensation for any transportation or incidental service.

There was such a tariff for transportation with protective service—"Perishable Protective Tariff No. 14" and its supplements—to which SP and UP, among more than 400 common carriers by railroad, were parties[29] (R 35, 36). PFE was not a party to that tariff, or any other (R 47). SP and UP in fact made available, on shipper's written order as required by the tariff, all of the types of protective service specified in the tariff of which there were nine general classifications.[30] The shipper selected and designated the type of service he desired[31] (R 44 et seq.).

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29. The material provisions of the tariff are summarized in the record at p. 44 and following. Operation under it will be commented on below.

30. These included various forms of refrigeration, various types of ventilation service and protective service against cold. Within each of the classifications further variations were possible on shipper's order. The shipper could designate the character of ice desired, whether crushed, coarse or chopped ice, was entitled to specify that the car be pre-cooled or pre-iced and the amount of salt, if any, to be used, etc., etc. "In short there were various types of protective service available under the tariff, the type of service once specified by the shipper could be changed by the shipper, and within each type of service there were variations which the shipper could specify." (R 44, 45).

31. The tariff expressly provided the method by which shippers could avail themselves of the services provided (R 36). The shipper "was required to specify to the carrier, in writing, the character of the service desired by the shipper. In addition, the shipper by direction in writing to the carrier, had the privilege, under the tariff, of changing the character of service. * * * The shipper was required to give to the carrier orders in writing as to the character of service desired within the various characters of service permissible under the tariff and the variations of each." (R 45, 46).

SP and UP, with many of the carriers party to the tariff, did not themselves own the reefers and the facilities for providing the protective service but obtained the car and protective service from various car companies (R 34-36). This practice was expressly provided for in the tariff (R 36).

This general method of providing transportation service for perishables was the method used in the United States for many years long prior to 1939[32] (R 48). In the case of SP this method of providing protective service for perishables through arrangement with third persons antedated 1902 (*Consolidated Forwarding Co. v. S. P. Co.,* 9 I.C.C. 182 decided April 19, 1902, showing that SP contracts with third persons for such service went back at least to 1897). It antedated the organization of and commencement of business by PFE (R 25). PFE was one of a number of such car companies, all of whom conducted their business in the same way[33] (R 34, 48). Its stock was owned by SP and UP (R 31). The matter of the ownership of the stock of such companies by railroads was a well-known and commonplace situation (R 48, 49).[34]

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32. This statement appears in the record at a point following a somewhat detailed description of the business of PFE. This will be outlined below.

33. "Car companies" are companies engaged in the same business as PFE (R 34). Many of the railroads, parties to the Perishable Protective Tariff and providing protective service to shippers, owned no reefers and obtained and provided such railroad service "by arrangement with various car companies in substantially the manner hereinafter described as to PFE." (R 36). The system of car hire, hereafter noticed in describing the business of PFE, "was uniform throughout the United States, applied to all car companies and all common carriers by railroad." (R 40).

34. The "principal car companies providing" protective service, as PFE did, were railroad owned by major common carriers by railroad in interstate commerce and this was "well-known to the Interstate Commerce Commission" and a matter "of general notoriety in the United States." (R 48, 49).

PFE, a Utah corporation, was organized in 1906, qualified to do business in California December 6, 1906 and began business October 1, 1907. **Since it commenced business its business has been substantially the same.** It acquired its facilities from the third persons who had heretofore provided protective service to SP and UP and from other sources.[35] It acquired none of its properties or facilities from SP or UP except as it acquired real property for ice plants and car shops by purchase or lease (R 30, 31).

As we have indicated the business of PFE was substantially the same, and conducted in substantially the same way, as the business of other car companies. The business was in three phases: (a) "car hire"—owning and supplying reefers to railroads, (b) operating shops for repair and rebuilding of equipment and operating ice plants and (c) providing protective service (R 37). PFE owned no cars but reefers and owned no rail motor power except one plant locomotive. It did not own or operate any tracks except shop tracks and plant unloading tracks at icing docks and icing plants. It "did no railroading and performed no railroad operations," car movements being handled by common carriers by railroad (R 41, 42).

The car hire business was what the name implies. PFE owned more than 35,000 reefers. It furnished these reefers to railroads in all parts of the United States and to all lines parties to the Perishable Protective Tariff. "It did not move, or control the handling of, the reefers so furnished" and they were freely interchanged between all of the railroads. For this it charged $.02 (later raised to

35. See footnote 27 above.

$.025) per car mile, loaded or empty. The charge was made to the carrier over whose line the movement was made, in whole or in part, for each mile on that line.[36] This system was uniform throughout the United States and applied to all car companies and all common carriers by railroad. The charge was paid by the carriers. No part of it was paid by shippers and the only charge paid by shippers for use of reefers was unsegregated and included in the line haul tariff of the rail carriers. Any rail carrier upon whose line any empty PFE reefer appeared could, and did, load and use that car in its own service. SP and UP followed this practice with respect to the cars of car companies other than PFE (R 37-41).

The operation of the shops calls for no comment. In these shops PFE repaired its own and reefers of other car companies on the lines of SP or UP or any other railroad so located that the PFE shops could be reached. The owner of the car paid for these repairs (R 42).

PFE manufactured ice and bought some ice from commercial manufacturers (R 43).

PFE provided protective service to common carriers by railroad (SP and UP included) which reached PFE plants by their own lines or where no service from any other rail carrier was required except switching service. It furnished such service to the Santa Fe at Bakersfield and to the Western Pacific at Carlin, Nevada and Modesto, California, and to various railroads at Salt Lake City. It provided the service for its own reefers and those of other car companies (R 43, 44). Covering this service for SP and UP was a written contract, approved by the Interstate Commerce Commission. **PFE had substantially**

36. See the examples given at pages 39 and 40 of the record.

similar contracts with other railroads (R 47). For this service PFE was paid by the rail carriers. Shippers paid it nothing. The shipper paid for the service by making payment to the rail carriers at the tariff rates provided in the Perishable Protective Tariff and made payment to the carrier presenting the freight bill for the line haul service or other appropriate carrier party to the line haul service (R 47).

PFE was party to no tariff. It made no charges to any shipper or other user of facilities of common carriers and had no business revenue except as herein noticed.[37] It issued no bills of lading or other shipping documents. It entered into no agreement with any shipper or other person using the services of rail carriers. All claims for loss or damage were made to the rail carriers and handled by them. PFE had no responsibility for any such claims except as responsibility for its own default was fastened on it by its contract with the carrier[38] (R 47, 48). This is the method of providing protective service which has been used in the United States for many years long prior to 1939[39] and was the method used by the principal car companies in this country (R 48).

PFE had an icing plant at Bakersfield. Appellant's Brief, quoting from the record but stopping in the middle of a sentence without indicating that the part quoted was not the whole sentence, undertakes to describe this business. This is what Appellant's Brief, p. 4, says: "It

37. See page 19 below.

38. For the provision of the SP-UP-PFE contract see R 62.

39. This date is significant as the date of amendment of the Federal Employers' Liability Act. See pp. 30 et seq. below.

is a fact that the icing service rendered by PFE under its protective service **contract of July 1, 1942, between it and SP and UP** applied only to SP in regard to the service under said contract by PFE at **Bakersfield** on June 7, 1946 at the time of the accident to plaintiff." That is accurate. That is true of the service "under its protective service contract of July 1, 1942." But that was only the contract between SP and UP. There was other service at Bakersfield. The rest of the sentence goes on: "but it is not true that that was the only icing service rendered by PFE at Bakersfield or that the only icing service rendered by PFE was rendered under said contract, as hereinabove more fully appears." (R 51). And further, on the next page of the record appears the following: "It is not a fact that ice supplied by PFE at Bakersfield, California, was there supplied only to SP but, to the contrary, the same was supplied by PFE to other common carriers by railroad." (R 52). And it further appears that some cars "leaving the PFE plant at Bakersfield * * * were hauled in their first line movement by Atchison, Topeka & Santa Fe Railway Company and/or Sunset Railway." (R 50, 51).

PFE's business was in no sense restricted to business with SP and UP. Nor were UP and SP restricted to the use of PFE reefers. Nor were their contacts in respect of protective service restricted to PFE but extended, as well, to other car companies providing that service (R 46). There was nothing extraordinary or unusual in the relation between SP and PFE. It was standard for all railroads and all car companies.[40]

40. For a detailed consideration of the contract of July 1, 1942 see page 40 below.

PFE was no hollow shell. In June, 1946 it owned more than 35,000 reefers (R 38). Its net worth was more than $40,000,000 (R 37). It conducted its car hire business in all parts of the United States and with all railroads. It conducted its other business in Oregon, Washington, California, Idaho, Utah, Nevada, Arizona, Texas, Louisiana, Colorado, Kansas, Wyoming, Nebraska and Iowa. It had car shops at Nampa, Idaho; Roseville, California; Los Angeles, California; Colton, California; Pocatello, Idaho, and Tucson, Arizona (R. 38). "Its income was payments received (1) from common carriers by railroad for car hire of cars, (2) from common carriers by railroad for protective service and (3) from car companies for repair of cars of other car companies." "From its own funds, PFE paid all operating expenses including wages of employees, cost of cars purchased, cost of supplies and materials, cost of plants, cost of power and public services, insurances, taxes, and, where property was leased by it from other person (railroads included), rent." (R 37).

"The PFE business and activities herein described were conducted and directed by its employees." (R 37). Its directors were, of course, elected by its stockholders and had connections with them. But its active operating officers were its own (full time) and had no railroad connection or connection with UP or SP (R 32, 33).

"The PFE business and operations, hereinafter [above] more particularly referred to, conducted and carried on by it were conducted, directed, managed and carried on for it by (a) its executive officials and (b) its employees as follows: General foreman, shop foremen, carpenters, carmen, carmen helpers, mechanics, mechanic's helpers,

machinists, car laborers, car painters, derrick operators, welders, store clerks, store deliverymen, store laborers, icemen **(including plaintiff)**, ice-pullers, and other men employed in ice manufacturing plants, ice plant managers, icing dock foremen, inspectors and the like. Said employees were all full-time employees of PFE and **none of them were joint employees of PFE and any other firm, person or corporation.** Most (if not all) employees in class (b) above belonged to labor unions (sometimes referred to as Brotherhoods) and PFE had collective bargaining agreements with said unions as the collective bargaining agents of such employees and as to the employees of PFE said collective bargaining contracts were solely between PFE on the one hand and such collective bargaining agent on the other hand and in respect of PFE business and employees. **Said employees in class (b) did their work under the control, supervision and direction of PFE officers and supervisory employees.** None of said employees of PFE were employed under or governed by any collective bargaining agreement or contract to which any railroad or SP or UP was a party. Seniority of the employees of PFE was solely by reason of employment by PFE, prior or later employment of such employee by any railroad or SP or UP had no relation to any seniority with PFE and there was no cross seniority between employees of PFE and employees of any railroad or SP or UP." (R 33, 34).[41]

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41. "No employees of SP were employed or worked at the PFE icing dock, or installations, or plant, or property at Bakersfield, California, except enginemen and switchmen, members of SP yard switching crews, who were full time SP employees and members of SP yard or switching crews switching cars in or out of tracks at said PFE plant, and elsewhere, in and about Bakersfield, Cali-

Plaintiff was an employee of PFE in every normal and usual and ordinary sense of the word employee[42]—in every sense in which it would be used by anybody except a lawyer endeavoring to maintain this action. The complaint concedes that he could be. It certainly makes no forthright claim that he was not[43] (see p. 2 above). The answer admits that he was an employee of PFE and denies that he was an employee of SP or of both SP and PFE (Answer R 9 et seq.). If he had any employment status other than that given by the restricted admission in the answer he had the burden of showing it (pp. 5 and 6 above). Not only is there no such showing but the showing is to the contrary. It was stipulated that he was paid by PFE (R 20) and the record shows: Plaintiff was working as a PFE iceman (R 33) working under the terms of collective bargaining contracts to which PFE was the only employer party (R 34) and working under the supervision of PFE officers and supervisory employees (R 34). No collective bargaining agreement to which any railroad or SP or UP was a party applied and seniority of PFE employees depended solely upon employment by PFE—prior or later employment by any railroad had no relationship to seniority by PFE and there was no cross

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fornia, in the normal course of common carrier railroad service of SP or in the course of a switching move of refrigerator cars or other cars used in the railroad 'protective service' of Atchison, Topeka & Santa Fe Railway Company or Sunset Railway, common carriers by railroad. **There were no employees of SP at Bakersfield, California, engaged in the business of PFE or performing any of its services or acting as its agent.**'' (R. 26).

42. This is the sense in which the word is used in the Federal Employers' Liability Act. See page 29 below.

43. The claim of possible joint employment is disposed of by the record, in terms. See pages 19, 20 above and note 41 above.

seniority between employees of PFE and employees of any railroad (see p. 20 above).

D. PFE Was Not a Common Carrier.

There can be no misunderstanding of the accepted meaning of "common carrier." "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place." (*The Propeller Niagara v. Cordes,* 21 How. 7, 16 L.ed. 41, 46 col. 1). "A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges." (*McCoy v. Pacific Spruce Corp.,* 1 F.2d 853, 855 (C.C.A. 9)). "The carrier may hire his vehicle, or his team, or his servant, for the purpose of transportation; or he may undertake to employ them himself in the act of transporting the goods of another. It is in the latter case only that he assumes the liabilities, and acquires the rights of a common carrier." (*Gracie v. Palmer,* 8 Wheat. 605, 632, 5 L.ed. 696, 703).

Under the Federal Employers' Liability Act the Supreme Court has held that "the words 'common carrier by railroad', as used in the Act, mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad acting as a common carrier," and added that this view "is in accord with the ordinary acceptation of the word." (*Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 187, 65 L.ed. 205, 213).

It is apparent that within "the ordinary acceptation of the words" PFE was neither a railroad nor a common carrier.

If elucidation of "railroad" is required, it will be found in the Act itself. The *Taylor Case* pointed this out not only by the Act's "mention of cars, engines, tracks, roadbed, and other property pertaining to a going railroad" but by its obvious reference to the Safety Appliance Acts and to "the use of similar words in closely related Acts which apply only to carriers operating railroads; and by the fact that similar words in the original Interstate Commerce Acts had been construed as including carriers operating railroads, but not Express Companies" (and we might add car companies, such as PFE, a matter to be enlarged upon below).

The general business of PFE has been stated. It was only that of owning, maintaining and letting reefers and providing protective service for these or any other reefers which reached its servicing plants (R 43 et seq.). It owned only reefers. It owned no rail motive power except one plant locomotive. It neither owned nor operated any tracks except shop tracks and icing dock unloading tracks. It "did no railroading and performed no railroad operations," unless it can be said that its very limited business amounted to railroading and, obviously, within the holding of the *Taylor Case* it did not (R 41, 42).

Nor within any common acceptation of the term was PFE a "common carrier." PFE, neither by virtue of any calling nor as a regular business, undertook to transport commodities from place to place. It performed no transportation services. Such service as was offered was not offered "to such as may choose to employ" it and pay its charges. There was no holding out to the public at all. It offered its services only to common carriers by railroad,

dealt only with them and was paid only by them. Only the common carriers by railroad offered transportation service "to such as may choose to employ" them. Only they received payment of the charges (R 47, 48). Indeed, PFE not being a party to any tariff (R 47) had no tariff charges and under the terms of the Interstate Commerce Act could not legally have collected any or performed any service for any shipper (see §6 of the Interstate Commerce Act, p. 12 above).

It is decidedly in the nature of an anticlimax to state and demonstrate that this has been the holding of the Supreme Court. It has been.

As a preliminary we point out again (see p. 14 above) that the business of all of the car companies is and always has been substantially the same. Not only is this true, from the record before the court, but it will be made apparent by the decisions of the Supreme Court.

Ellis v. I. C. C., 237 U.S. 434, 59 L.ed. 1036 passed upon the question how far the Vice President and General Manager of the Armour Car Lines could be required to answer questions in an investigation conducted by the Interstate Commerce Commission. The holding was that he was not different from any other witness; that the Commission had no enlarged powers because of the character of the Car Lines but, to the contrary, the Car Lines was "not a common carrier subject to the" Interstate Commerce Act; that though the railroads might be answerable for what they hired from the Car Lines "that does not affect the nature of the Armour Car Lines itself." To arrive at this conclusion the court analyzes the business of the Car Lines. Since the Court will read this statement

we do not quote it or summarize it. The statement demonstrates that the business of Armour Car Lines was exactly the business of PFE, conducted in the same way.

The next car company case, *U.S. ex rel. v. I. C. C.,* 265 U. S. 292, 68 L.ed. 1024, must be considered with the *Taylor Case,* p. 22 above. The *Taylor Case* held that an express company messenger, injured while he was working on a train, could not sue under the Federal Employers' Liability Act; that the express company was not a common carrier by railroad; that the contract between the railroad and the express company provided no basis for distinguishing the Pullman porter's case, *Robinson v. B. & O. R. Co.,* 237 U.S. 84, 59 L.ed. 849. The significance of the *Taylor Case* is its holding that the words "common carrier by railroad" in the Federal Employers' Liability Act have the same meaning as similar words in the Interstate Commerce Act and are to be construed to mean only carriers operating railroads (see p. 22, above). The Federal Employers' Liability Act was without significance because Taylor was not an employee of the railroad and the express company was not within the Act. *U. S. ex rel. v. I. C. C.,* decided that a car company, Chicago, New York, & Boston Refrigerator Company, was not a "carrier by railroad," under the Transportation Act of 1920 which made guarantees to carriers and defined carriers as "a carrier by railroad * * * and (2) a sleeping car company." Again the business of the car company was like that of PFE and was conducted in the same way except that the car company had more direct relation with shippers in that it solicited freight and exercised a supervision over the shipment, in some instances issuing bills of lading. We

do not detail the facts because, again, the Court will read them. Arriving at its conclusion the Supreme Court rested on two cases, the *Taylor Case* and the earlier car company case, the *Ellis Case*. The attempt to distinguish the *Taylor Case* because the language there under consideration was in the Federal Employers' Liability Act was rejected because in the *Taylor Case* "the definition was not made to rest upon any peculiarity in the Act under review, but was said to be 'in accord with the ordinary acceptation of the words.' " Of the *Ellis Case* it was said that "the facts * * * were much the same as those in the present case" and, after quoting the *Ellis Case* at some length, the Court goes on:

> "It is enough to say that, under the facts, the Car Company is not a carrier by railroad, or, indeed, a common carrier at all, within the ordinary acceptation of the words, and there is nothing in the terms of the Transportation Act which suggests a different view. * * * If the Car Company is a carrier by railroad, it would seem to follow that sleeping car companies and express companies are likewise included within the word. **Evidently, however, Congress did not think so, since §209 of the Act contains two provisions in respect of these companies, which would have been entirely unnecessary if they had been so included."**

U. S. v. Fruit Growers Exp. Co., 279 U.S. 363, 73 L.ed. 739 held that a railroad owned (R 49) car and protective service company like PFE could not be indicted for violation of the Interstate Commerce Act because it was not a "common carrier." The contention made and sustained was that the car company was one **"whose only relation**

to a carrier is that of an independent contractor." The Court said, citing among others the *Ellis Case:*

> "It was the duty of the common carrier to provide for the icing and also to furnish reports as to the amount delivered in a record kept by it for the information of shippers and of the Interstate Commerce Commission. **But there is no reason why this duty with respect to the furnishing of ice might not be performed by an independent contractor."**

The *Ellis Case* is again noticed in *General Am. T. Car Corp. v. El Dorado Term. Co.,* 308 U.S. 422, 428, 84 L.ed. 361, 367, where the Court points out that though railroads are under an obligation to furnish special cars "they are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them * * *. The lessor of such cars to a railroad, however, **is not itself a carrier or engaged in any public service."**

With these cases, should be read *Reynolds v. Addison Miller Co.,* 143 Wash. 271, 255 Pac. 110, discussed below.

The cases dealing with the analogous situation of employees of the Pullman Company, the *Robinson Case,* p. 25 above, and employees of express companies, the *Taylor Case,* above, go all the way. They necessarily hold that there is no ground for application of the Federal Employers' Liability Act to the employees of any such company upon any theory because both hold that a provision of the contract between the employees and the Pullman Company or the express company, exonerating the railroad from liability in the event the employee is injured, is valid. It could not be if the Federal Employers' Liability Act applied (§5, 45 U.S.C.A. §55) so that the cases neces-

sarily hold that the Act does not apply to the employer, because it is not a common carrier by railroad, and necessarily hold that the employee is not directly or indirectly an employee of the railroad. If he were the Act would apply and strike down the contract.

Another express case, *United States v. American Ry. Exp.,* 265 U.S. 425, 68 L.ed. 1087 should be compared with the *Taylor Case.* Again the problem was the meaning of the term "carrier by railroad." The *Taylor Case* and one of the car cases, *U. S. ex rel. v. I. C. C.* are relied upon and there is a review, particularly in Note 9, of the use of terms in various of the Federal statutes the court pointing out that while many of them including the Federal Employers' Liability Act, use only the term "carrier by railroad," the Twenty-Eight Hour Law of 1906 enumerates in addition to railroads—an obvious recognition of a different and additional category—"express company, car company," etc.

With the *Robinson Case* should be considered another Pullman porter case, *Taylor v. New York C. R. Co.,* 294 N.Y., 397, 62 N.E.2d 777, cert. den. 326 U.S. 786, 90 L.ed. 427. The claim there was that a Pullman porter was a joint employee of the Pullman Company and the railroad. As in the *Robinson Case* the court examined the contract between the Pullman Company and the railroad and held that there was nothing in it to support a contention that the Federal Employers' Liability Act applied.

These holdings have been given Congressional approval and Congress has re-expressed its meaning in parallel legislation. Before turning to this one other matter should be noticed.

E. Meaning of "Employed" and "Employee."

We pointed out (p. 21 above) that plaintiff was an employee of PFE in the normal, usual and ordinary sense of the word. This is the sense which should be taken for the word as it is used in the Federal Employers' Liability Act.

In the *Pullman Case, Robinson v. B. & O. R. Co.,* p. 25 above, the Court said:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

This language was approved in *Hull v. Phila. & R.R. Co.,* 252 U.S. 475, 479, 64 L.ed. 670, 673. How the rule has worked in concrete application is shown in a number of cases which are best discussed below.

F. Congressional Expressions of Intention.

The cases so far dealt with have been concerned, of course, with the intention of Congress and to reach that intention made use of other expressions of intention by Congress. But Congress's own expression of intention is entitled to separate consideration because of its expression since those cases were decided. To evaluate these

Congressional expressions one or two preliminary matters need statement.

Some dates of decisions are important. As early as 1902 the existence and general nature of the business of car companies providing protective service was noticed in a published report of the Interstate Commerce Commission (see p. 14 above). In 1912 and 1913 in *Missouri etc. Ry. Co. v. Blalack,* 105 Texas 296, 147 S.W. 559 and *Missouri etc. Ry. Co. v. West,* 38 Okla. 581, 134 Pac. 655 it was held that the Federal Employers' Liability Act did not apply to employees of express companies injured while working on trains. This rule was conclusively established in the *Taylor Case,* pp. 22-26 above, in 1920. Meanwhile in 1915, in the *Robinson Case,* p. 25 above, the same rule was applied to employees of the Pullman Company. In that same year the *Ellis Case,* p. 24 above, held that car companies, providing protective service, were not common carriers by railroad or subject to the Interstate Commerce Act as it then read. In 1916 the *Bond Case,* p. 63 below, held the Federal Employers' Liability Act did not apply to an independent Contractor doing essential railroad work. The holding of the *Ellis Case* was confirmed, in somewhat different circumstances, in 1924 in *U. S. v. I. C. C.* and in 1929 in *U. S. v. Fruit Growers Exp. Co.,* p. 26 above. In 1927, shortly before the last of these cases, *Reynolds v. Addison Miller Co.,* p. 27 above, had held that the Federal Employers' Liability Act did not apply to employees of a concern providing protective service for a railroad.

In the course of these decisions the Supreme Court established that the terms "common carrier by railroad,"

"employee" and "employed" were used in the Federal Employers' Liability Act in the commonly accepted sense and that "common carrier by railroad" was used in the Federal Employers' Liability Act in the same sense that it was used in the Interstate Commerce Act (p. 25 above). Secondly, these cases have noticed that the commonly accepted sense of the term "common carrier by railroad" is narrow and confined strictly to a railroad proper acting as a common carrier. Two circumstances indicating this were pointed to. In the *Taylor Case* (see p. 22 above) other provisions of the Federal Employers' Liability Act were pointed to and it was observed that the reference in Section 1 (45 U.S.C.A. §51) to the "cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves, or other equipment" of the "common carrier by railroad" mentioned in that section gave color and meaning to the words "common carrier by railroad." The second consideration, noticed in *U. S. v. I. C. C.*, quoted at p. 26 above, and *U. S. v. Am. Ry. Exp. Co.*, p. 28 above, was that in related statutes where Congress wanted to deal with some concern which was not a railroad in the strict sense, as a sleeping-car company or an express company, there was no attempt to sweep them within the meaning of "common carrier by railroad" but such concerns were separately and expressly mentioned in terms.

The Acts most closely related to the Federal Employers' Liability Act, and, indeed, referred to in it (45 U.S.C.A. §§53, 54), are the Safety Acts and the Boiler Inspection Act. The Safety Act of 1893 uses the terms "common carrier engaged in interstate commerce by railroad" (45 U.S.C.A. §§1, 2, 6, 7) and "railroad company" (45 U.S.

C.A. §4). The Safety Act of 1903 (45 U.S.C.A. §8) refers to "common carrier by railroad." The Safety Act of 1910 (45 U.S.C.A. §11, §13) refers to "common carrier subject to the provisions of Sections 1-16" and "common carrier subject to Sections 11-16." Various of the substantive provisions of these Acts refer to locomotives, trains, engineers, brakemen, hauling or moving traffic, "use on its line," receiving from connecting lines, running trains, percentage of power brakes in trains, etc., all indicating that the person subject of the Act is a railroad in the strict sense, being operated as such, and not including any independent third person providing merely accessorial service to an operating railroad. It is made abundantly clear that these statutes, which should have at least as wide application as the Federal Employers' Liability Act, never contemplated application to a business such as that of PFE. The same is to be said of the other statutes which are *in pari materia*. The application of the Locomotive Ash Pan Act of 1908 is to "common carrier engaged in interstate or foreign commerce by railroad" and "common carrier by railroad" (45 U.S.C.A. §17). The Accident Report Act of 1910 (45 U.S.C.A. §§38, 40) is to apply to a "common carrier engaged in interstate or foreign commerce by railroad" and requires reports of "collisions, derailments or other accidents resulting in injury to persons, equipment or roadbed." The Boiler Inspection Act of 1911 (45 U.S.C.A. §22) applies to a "common carrier by railroad."

Meanwhile in 1907 Congress had adopted the Hours of Service Act. It was intended to apply in the same field as that of the statutes just noticed. For this reason its

somewhat different wording is very interesting. By Section 1 (45 U.S.C.A. §61) it is to apply to common carriers "engaged in the transportation of passengers or property by railroad." That "railroad" is a word of confined meaning is indicated by the express provision that as used in this Act it "shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad." If "bridges and ferries" are not included under "railroad" and require separate specification "railroad" **as Congress used the word** is a word of confined meaning and means what it says, a road of rails. Compare the Adamson Eight-Hour Law (45 U.S.C.A. §65) of 1916, which is to apply to "employees" "employed by any common carrier by railroad" actually engaged in train operation.

In contrast are those statutes which Congress intended to apply to concerns other than railroads or common carriers by railroads and the language that Congress used to effect its purpose.

Originally the Interstate Commerce Act applied only to carriers "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water." To enlarge the jurisdiction of the Interstate Commerce Commission Congress amended this section in 1906 to include express companies, sleeping car companies and pipe lines and in 1910 to include telegraph, telephone and cable companies (*United States v. Am. Ry. Exp. Co.,* 265 U.S. 425, 432, 68 L.ed. 1087, 1092). It did this by expressly enumerating with carriers engaged in transportation of passengers or property by railroad, etc.,

those engaged in transportation of oil or other commodities by pipe line or engaged in the transmission of intelligence by wire and wireless; in terms provided that "common carrier"[44] should include all "pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; **express companies; sleeping car companies**" (49 U.S.C.A. §1). That none of these expressions include a car company or company engaged in giving protective service is abundantly demonstrated by later subsections of the same section. Sub-section (10) and following deal with car service and sub-section (14) specifically refers to cars not owned by the carrier using them. This sub-section is of particular interest because of paragraph (b) added to it in 1934 (49 U.S.C.A. §1, Pocket Part) making it "unlawful for any common carrier by railroad * * * to make or enter into any contract, agreement or arrangement with any person for the furnishing to or on behalf of such carrier * * * of **protective service against heat or cold to property transported** * * * until such contract, agreement or arrangement has been submitted to and approved by the Commission." **Congress in 1934 expressly recognized the existence of the business of providing protective service through arrangement with third persons—it recognized the existence of PFE and its business—and yet it continues to differentiate it from a common carrier by railroad or any other of the companies specified in Section 1 of the Interstate Commerce Act as subjects of regulation.**

With the general provisions of the Interstate Commerce Act which clearly do not cover car companies or protec-

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44. Notice the absence of the words "by railroad."

tive service companies should be compared one section of that Act which does and certain other statutes. By amendment in 1940 (49 U.S.C.A. §20 (6)) the power of the Interstate Commerce Commission to inspect and copy books, accounts, records, etc., was expressly extended to "persons which furnished **cars or protective service against heat or cold to or on behalf of any carrier by railroad.**" This was not the first time that Congress, by express enumeration, dealt with car companies and companies providing protective service. The Railway Labor Act (45 U.S.C.A. §151) adopted in 1926 and amended in 1934, 1936 and 1940 expressly provides that "carrier" "includes any express company, sleeping-car company, carrier by railroad * * * and any company * * * which operates any equipment or facilities or performs any service (other than trucking service) in connection with * * * **refrigeration or icing.**" In 1937 and 1938 there was a series of cognate statutes, the Railroad Retirement Act (45 U.S.C.A. §228a), the Railroad Retirement Tax Act (26 U.S.C.A. §1532), the Carriers Taxing Act (45 U.S.C.A. §261) and the Railroad Unemployment Insurance Act (45 U.S.C.A. §351). They all provide, in the sections noticed, that they apply to carriers, defined to mean "any express company, sleeping-car company, or carrier by railroad" and "any company * * * which operate any equipment or facility or performs any service * * * in connection with * * * **refrigeration or icing.**" It is interesting that under these statutes employees of third persons providing accessorial service such as "employees who put the same ice into refrigerator cars" were employees of the third persons and not of the railroads. (*Northern Pac. Ry. Co. v. Rey-*

nolds, 68 Fed. Supp. 492 (Dist. Ct. Miss.); *Penn. R. Co. v. United States,* 70 Fed. Supp. 595 (Ct. of Claims).)

This is the background against which the 1939 amendment of the Federal Employers' Liability Act stands. The purpose of the 1939 amendment of Section 1 (45 U.S.C.A. §51) was definitely and expressly to enlarge the scope of application of the Federal Employers' Liability Act. This was done only by enlarging the definition of interstate commerce and providing that an injured employee need not actually be engaged in interstate commerce at the moment of injury if any part of his duties were the furtherance of interstate commerce. **But the Act still applies only to "employees" of "common carriers by railroad."** In spite of the construction theretofore given to those expressions, the decisions as to the scope of application of the statute as a whole, Congress's knowledge of the existence of organizations engaged in the car hire business and the business of providing protective service and its knowledge, by use, of appropriate expressions for bringing such persons and business within the scope of regulation Congress expressly elected **not** to extend the terms of the Federal Employers' Liability Act beyond common carriers by railroad **as theretofore defined by the Supreme Court.** It elected not to disturb the holding of the *Robinson, Taylor and Reynolds Cases.*

G. Reynolds v. Addison Miller Co., 143 Wash. 271, 255 Pac. 110.

The *Reynolds Case* passed upon the point here involved, directly. It holds that an employee of an icing company providing icing service for a railroad, injured while he was doing that work, cannot sue under the Federal Employers' Liability Act. The case is a square holding.

Appellant's brief nicely points out the significance of the *Reynolds Case* by citing *State v. Bates & Rogers Construction Co.,* 91 Wash. 181, 157 P. 482. The *Bates Case* was expressly disapproved by the same court and on the exact point, in the *Reynolds Case.*

In the *Bates Case* the railroad contracted with Bates to repair a railroad bridge. The court held that the contract was not valid under Section 5 of the Federal Employers' Liability Act; that though Bates was an independent contractor, its employees were within the Federal Employers' Liability Act. **This holding (vital to the plaintiff's contention in the principal case) was expressly disapproved** in the *Reynolds Case.*

In the *Reynolds Case* plaintiff was icing cars in these circumstances: Addison and the railroad had made a contract whereby the railroad leased to Addison an icehouse and icing platform.[45] Addison agreed to manufacture, sell,

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45. We got the complete contract involved in *Reynolds v. Addison-Miller Co.,* 143 Wash. 271, 255 Pac. 110 from the Law Department of Northern Pacific Railway Company, the railroad involved and set out its principal provisions in a supplement brief in the court below. If any question were to be made the transcript of record in that case was available. Our statements were not questioned.

The contract was dated October 23, 1924, was between the railway company and Addison-Miller, Incorporated, and dealt with icing at Pasco, Washington. It had a provision substantially like paragraph 8 in the contract here in question (see below, p. .....). In Part IV it provided that the contractor would provide ice in the bunkers of all refrigerator cars set by the Railway Company "when and as called for by it," and:

> "Icing of cars by the Contractor shall be performed in accordance with such instructions as may be issued from time to time by the Railway Company covering methods to be used in placing ice in the bunkers of cars. * * * At any time that the Railway Company shall require salt to be used in the bunkers of refrigerator cars, and shall furnish an adequate supply thereof for that purpose, the Contractor shall place salt in the bunkers of refrigerator cars as directed."

and deliver in the bunkers of all refrigerator cars which the railroad might set out at the icing platform, all the ice that was required for use by railroad. The railroad had the right to inspect the work performed by Addison. Plaintiff was injured icing a car. Action was brought under the Federal Employers' Liability Act. Defendants' motion for a directed verdict was granted. A new trial was granted. On appeal this order was reversed with direction to enter judgment for defendants.

The Court held that Addison was not a common carrier by railroad, was an independent contractor and the employees of Addison were not the employees of the railroad. The Court discussed the leading U. S. Supreme Court cases and other cases in support of its conclusion. In respect of the *Bates Case* the Court said:

> "The respondent, however, cites us to one opinion of this court from which he derives comfort, and which, it must be admitted, contains language—**unsupported, however, by any citation of authority**—

Part IX provided that the contractor should comply with all requirements of the Workman's Compensation Act and "at all times fully indemnify and save the Railway Company harmless from all claims and causes of action by employees of the parties hereto or third persons, on account of personal injuries, death or damage to property." (Compare this with similar hold harmless clause in the SP-UP-PFE contract.) Part X provided that the Railway Company should furnish free transportation of all material and equipment necessary for plant construction and the production of ice and free transportation for employees. Part XII provided that the contractor would favor the railroad when it was having transportation done.

The opinion in the *Reynolds Case* reviewed the contract and said of it that the contractor was to furnish labor and had exclusive power of directing its employees as to their duties and the time and place where they should perform them, "the Railway Company having no authority in any manner over such employees." There was no express provision in the contract to this effect. This is the court's holding of its legal effect.

which would indicate that the respondent had a right to maintain this suit. That language was not necessary to the decision of the case and, as already said, was unsupported by authority, and in fact is contrary to what is practically the unanimous decisions of all the courts which have considered this question. The case referred to is *State v. Bates & Rogers Construction Co.,* 91 Wash. 181, 157 P. 482, * * *. This dictum cannot be supported either upon reason or authority, and has never been followed by this court."

The *Reynolds Case* factually is on all fours with the principal case. It is a square holding against the plaintiff, and is abundantly supported by "practically the unanimous decisions of all the Courts which have considered this question," including those of the United States Supreme Court.

H. Appellant Was Not Engaged in Any Work to Provide Service for SP.

PFE provided protective service at Bakersfield for SP, Santa Fe and Sunset. In order to perform this service, at times, it moved ice from other points to Bakersfield by railroad (R 43). To handle this ice when it arrived it had an unloading track held by it under lease. The switching of the cars into this track was done by SP. PFE performed no railroad operations. All the switching was done by SP (R 50).

The ice being handled "by the plaintiff and his fellow employees at Bakersfield, California, on or about June 7, 1946" was such ice, hauled to Bakersfield to be available for any service that PFE might furnish, whether to

SP, Sunset or Santa Fe. In fact, the very cars in question, on their first revenue trip moved over the line of Santa Fe (R 50). No protective service was being provided. No ice was being put into a car. Ice was being unloaded. The movement of the cars, by cable and winch, a non-railroad method of movement, was a mere incident to PFE's own activity in unloading the ice. Neither plaintiff nor PFE were acting for SP or providing any service to it or any of its shippers, whether as agent, independent contractor or otherwise. Plaintiff and PFE were no more acting for SP than they were for Santa Fe. Any contract with SP had no more relation to what was being done than a contract with Santa Fe or Union Pacific or Western Pacific or Sunset.

IV.

REPLY TO APPELLANT'S POINTS

A. The "Protective Service Contract" of July 1, 1942.

Plaintiff seems to think that the protective service contract of July 1, 1942 distorts the considerations so far noticed. It is gravely to be doubted whether plaintiff can take advantage of it. As, in *Hull v. Phila. & R.R. Co.*, 252 U.S. 475, 489, 64 L.ed. 670, 673 (see below), "he was not a party to the agreement between the" railroads and PFE "and is not shown to have had knowledge of it" but, as in that case, we pass this, for, as said there, "assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case," that for all purposes he was an employee of PFE.

The contract of July 1, 1942 (R 47, 54-75), superseded "as of that date the agreement between the parties hereto dated July 1, 1936" (par. 26, R 68). But this worked

no change in the way the business was conducted. "The business conducted by PFE since the commencement of business by it was substantially its business" described above (R 30). It was the same business conducted by "a number of corporations in the United States engaged in the same line of business." (R 34). Its method "of providing reefer service and railroad protective service had been used in the United States for many years and for many years long prior to 1939 and while PFE was conducting its business as aforesaid" (R 48). The contract "was approved by the Interstate Commerce Commission" and "PFE had substantially similar contracts with other railroads." (R 47).

It is against this factual background that the contract must be considered (see p. 8 above). It did only what would be expected in the circumstances. This Court, if called upon, could and would draw a substantially similar contract. We give its main outlines first and then turn to those portions on which appellant seems to rely.

The contract makes careful distinction between employees of PFE and those of SP and UP. See paragraphs 10, 11, 21. The parties did not treat the employees of PFE as railroad employees nor railroad employees as those of PFE.

These, in general, are the obligations of PFE: It is to provide all "services necessary to the effective refrigeration, and/or heating" which the railroads are required to furnish and to furnish the necessary ice and heating appliances and fuel (pars. 1, 2) for which it is to be paid as provided in Appendix B (par. 3). In addition it is to provide ice and heating for L.C.L. shipments and for certain

other railroad purposes being paid the cost[46] of the ice and in the case of the heating "a proper charge" (pars. 4, 22). PFE is "to furnish the labor required" except that at stations where this is impracticable and the service is not regularly required and it can depend on the railroad "for temporary labor assistance" the railroads agree to have their employees act for PFE and the railroad to be reimbursed "for all expense incurred thereby" (par. 10).[46a] In addition PFE is to provide and maintain at its expense necessary "fixed properties," if ground is furnished by the railroads an appropriate rental shall be paid and it is to provide tracks for loading and unloading ice although the railroads will provide the tracks necessary for the icing of cars en route or preicing (pars. 17, 18). PFE will make studies concerning charges, rules and regulations (par. 7) and there is further provision for the keeping of records and making of settlements (pars. 21, 23).

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46. Cost is defined in Appendix B as including "production cost, maintenance and running expenses of ice plants, storage houses, icing platforms, cost of ice purchased, freight charges at company-material rate of five mills per ton-mile for transportation of ice, and a proper proportion of general expenses" and in addition "**a return at the rate of 6 percent per annum on the value of property of the Car Line employed, depreciation at the rate of 4 percent per annum** on the book cost of such property subject to depreciation, and applicable taxes."

46a. The provision is that "at stations where it is impracticable or undesirable to employ a regular icing force or special employees, and the furnishing of ice or the inspection of cars moving under refrigeration or heater service is not regularly required, but where for the expeditious handling of freight the Car Line may be dependent upon the Railroads for temporary labor assistance, the Railroads agree to have their employees, acting as agents for the Car Line, promptly perform the necessary service for the Car Line." (Par. 10). This is an exception to the general provision of the same paragraph that "the Car Line agrees when necessary to furnish the labor required to carry out the provisions of this agreement for the refrigeration and/or heating of cars."

In return the railroads, in addition to making the payments specified, will: Supply PFE with ice where the railroads have a surplus, being paid at cost (pars. 5, 6); furnish labor where it is impracticable for PFE to maintain a force and, where permitted to, will supply transportation and telegraph and telephone service, with certain provisions for compensation (pars. 15, 16); will perform services for PFE in various departments of the railroads at cost "plus usual percentages" (par. 19) and if they supply tools, supplies, appliances, material or equipment will be paid cost at the point where supplied "plus five (5) percentum" (par. 20).[47]

There are provisions for indemnity in the event of injury to persons or property (par. 11) and adjusting responsibility for damage to freight (pars. 12-14).

As would be expected it is provided that the employees of the railroads and of PFE will cooperate and exchange information (par. 9), that PFE will perform under the contract "without unjust discrimination against or undue favor to" either railroad "or any shipper" and that since the shippers are entitled to select the type of service available to them under the tariff and give orders to the railroads as to the type of service desired (see p. 13 above), in the performance of its service PFE will promptly and strictly obey the orders of the railroad on whose tracks the loading, unloading or movement takes place (par. 8).

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47. These provisions are normal. They provide a method by which PFE can obtain necessary facilities at points remote from points of supply and where the only person available to supply the facilities and materials is one of the railroads. These provisions are not that the railroad shall supply tools or services or facilities but merely that if it does this shall be on a cost-plus basis (see pars. 19 and 20).

There is nothing here which changes the legal effects which flow from the way the business was in fact conducted. There is nothing which could be added or taken away, agreeably to the method of doing business, which would change the result. There is nothing which could fairly be omitted. In short the contract provided merely what service was to be provided, how it was to be paid for, that proper records be kept, adjustments for losses be made, the parties cooperate and PFE provide that type of service available under the tariff which the shipper ordered.

It is suggested that SP controlled, or had the right to control, the way PFE conducted its operations. The first thing is that the situation of SP was not different from that of UP. In actual fact PFE conducted its own business through its own employees, employed by it under collective bargaining arrangements made between it and the Brotherhoods, and its operations and the work of its employees was directed by its own full-time officers (see p. 19 above). Its method of business was that which had been common in the United States for many years (R. 48) and its contract here noticed was substantially the same as contracts it had with other railroads (R. 47). There is nothing in that contract which gave SP or UP or both any right of control of the way PFE handled its business. The only possible provision from which this could be argued is paragraph 8.

Paragraph 8 simply provides that in rendering service PFE shall not discriminate and that in performing the service "the orders of the System on whose tracks loading, unloading, or movement takes place shall be promptly

and strictly obeyed by the Car Line." This is in no sense restricted to SP and UP or both. But the more important aspect is that it does no more than make provision for coordinating PFE service with railroad service to the end that the railroads can provide to their shippers **such services as the shippers order** and as are available under the tariff (see p. 13 above and R 44 et seq.).

> "In short there were various types of protective service available under the tariff, the type of service once specified by the shipper could be changed by the shipper, and within each type of service there were variations which the shipper could specify. The shipper was required to give the carriers orders in writing as to the character of service desired * * * SP or UP, on receipt of the shipper's orders * * * transmitted these by orders to PFE and PFE then complied with said orders and furnished the character of service ordered. **In the performance of protective service no other orders were given by SP or UP to PFE except such orders, and such orders were only as to the character of service ordered by the shipper, such orders were only as to the result to be furnished to the shipper and neither SP nor UP gave PFE orders as to how PFE should accomplish the result of providing the type of service ordered by the shipper. * * * In this regard there was no distinction between the orders for performance of protective service given by SP to PFE in respect of cars on SP lines and orders given by SP to other railroads, car companies or other third persons** in respect of cars originating on SP lines but off SP lines at the time the order was given." (R 45-47)

Provision for such orders, necessary for the coordination of the activities of the railroad and PFE, gives no

base for the argument that PFE is a common carrier by railroad or that the Federal Employers' Liability Act applies (see cases below and compare *Norfolk & W. Ry. Co. v. Hall,* 57 F.2d 1003 (C.C.A. 4), *Mo. etc. Co. v. Blalock,* 105 Tex. 296, 147 S.W. 559 and *Mo. etc. Co. v. West,* 38 Okla. 581, 134 Pac. 655). The *Robinson Case,* p. 25 above, expressly noticed that "the railroad company had the control essential to the performance of **its** functions as a common carrier" and that to this end Pullman employees "were bound by the rules and regulations of the railroad company." But this did not make the Federal Act applicable. Another Pullman case, the *Taylor Case,* at p. 28 above, reached the same result although it was noticed that "the Pullman Company employees to some extent furthered defendant's purposes and cooperated with its own employees." The line which the *Bond Case,* p. 63 below, used applies:

> "There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. * * * The power given was one of control in a sense, **but it was not a detailed control** of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetence or neglect. The whole instrument shows system and particular care. It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results.

> * * * The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done."

Two cases provide interesting comparisons in view of the very broad construction given to the conception of employee under the Social Security Act, *United States v. Silk,* 331 U.S. 704, 91 L.ed. 1757 and *Bartels v. Birmingham,* 332 U.S. 126, 91 L.ed. 1947.[48]

There are other provisions of the contract utterly inconsistent with a construction which would make paragraph 8 say that the railroads had a right to control the details of how PFE went about its business. Paragraph 9 provides that agents and employees of the railroad and agents and employees of the car line shall cooperate and exchange information. This would be utterly unnecessary if the railroads were in control of PFE operations and could themselves direct the detail of activity of those persons separately classified in the contract as "agents and employees of the car line" in contradistinction to "agents and employees of the railroad." So the express provision of Paragraph 10 that the car line would furnish the necessary labor would be useless and meaningless. So the provision of Paragraph 18 that the car line would provide necessary equipment. If the railroads were in complete control they could order such equipment pro-

48. Contract between a band leader and a dance hall expressly provided that the dance hall operator should have complete control of the services of the employees.

vided without any special provision in the contract. So the provisions of Paragraph 21 for keeping complete records.

Finally appellant attempts to seize on those provisions of the contract stating that the services preformed by PFE it shall perform "as the agent of the railroad." The obvious purpose of the provision is to make it clear that PFE's only relationship shall be with the railroads and that it is not acting directly for and in relationship with the shippers.

The word "agent" and "agency" connote no such confined and restricted class of relationship as appellant seems to have in mind but are of a very wide meaning and describe a great variety of relationships.[49]

"Agency" contemplates three distinct relationships: (1) principal and agent, (2) master and servant, and (3) employer or proprietor and independent contractor. (*Mechem Agency,* 2 ed. §1 et seq., especially §§4, 8, 25, 40 and §§1870, 1871, 1917-1920). The *Restatement, Agency,* §1 and Comment C recognizes this threefold distinction[50] (see

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49. National banks are spoken of as agencies of the United States (*Posadas v. Nat. City Bk.,* 296 U.S. 497, 500, 80 L.ed. 351, 354; *First Nat. Bk. v. Marion Co.,* 169 Or. 595, 130 P.2d 9, 10). A bank may act as an agent for one of its customers (*Hill v. Citizens etc. Bk.,* 9 Cal.2d 172, 69 P.2d 853). But the employees of the bank are its employees alone; they are not employees of the government or of the customer. The bank is not a mere servant—using that word in its technical common-law sense—so that whoever engages its services makes its employees his employees. So it is common to speak of people engaged in independent callings on their own account, with their own employees, as sales agencies (*Jameson v. Simonds Saw Co.,* 2 Cal. App. 582, 84 P. 289; *Fuller v. Hindenbaum,* 29 C.A.2d 227, 84 P.2d 155).

50. On the general subject, of many of the cases noticing the Restatement, the following may be consulted: *Hurla v. Capper Publications,* 194 Kan. 369, 87 Pac.2d 552; *Courier Journal v. Akers,* 295 Ky. 745, 175 S.W.2d 350; *Henkelmann v. Metro etc. Co.,* 180 Md. 591, 26 Atl. A.2d 418; *Western Ind. Co. v. Pillsbury,* 172 Cal.

Groton v. Doty, 57 Idaho 792, 59 P.2d 136, 139 and *Ryan v. Wisconsin Dep. of Tax.,* 242 Wis. 491, 8 N.W.2d 393).

> "The term 'agency' is a broad one and may include every relation in which one person acts for another. It is frequently used in connection with an arrangement which does not in law amount to an agency, as where the essence on an arrangement is bailment or sale, as in the case of a sale agency exclusive in certain territories."
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> *State etc. Fund v. I.A.C.,* 216 Cal. 351, 114 P.2d 306.

The question is not whether one was an agent **but what sort of an agent** he was. (*Great Am. Ind. Co. v. Fleniken,* 134, F.2d 208 (C.C.A. 5), cert. den. 219 U.S. 753, 87 L.ed. 1706, reh. den. 319 U.S. 785, 78 L.ed. 1728.)

The relationship of PFE and SP is to be determined by the facts—by the provisions of the contract as to what is to be done and by the facts and acts of the parties under the contract. The fact controls, not some characterization of it. (*Bessing v. Prince,* 52 Cal. App. 190, 193, 198 P. 422[51]; *State Finance Co. v. Smith,* 44 Cal. App.2d 688, 692, 112

807, 159 Pac. 721; *Kourik v. English,* 340 Mo. 367, 100 S.W.2d 901, 905; *Ellis v. Associated etc. Corp.,* 24 F.2d 809 (C.C.A. 5), cert. den. 278 U.S. 649, 73 L.ed. 561. And, of course, there should be considered the cases where one is actually providing carrier service for another as in the *Grayvan Case* reported with *United States v. Silk,* the *Seas Shipping Co. Case* and the *Magruder Case* (discussed below) and where accessorial service is provided as in the *Pullman* and *Express Cases.* To these should be added one other case. In *Soderberg v. Atlantic etc. Corp.,* 19 F.2d 286 (C.C.A. 2), cert. den. 275 U.S. 542, 72 L.ed. 416 the Cunard Company employed Funch Edye & Co. "as the ship's agent." They in turn employed Atlantic L. Corp. to lade the ship. The latter was guilty of negligence. Held, that the Cunard Company was not liable.

51. "Although the contract began with the statement that respondent appointed appellant as his agent, the contract as a whole shows that it was not a contractive agency * * *."

P.2d 901[52]; *J. R. Watkins Medical Co. v. Williams,* 124 Ark. 539, 187 S.W. 653, 655 col. 2[53]; *Eckerd v. Merchants Shipbuilding Corp.,* 280 Pa. 340, 124 A. 477, 479 col. 2[54]; 2 *Am. Jur.* 27 (Agency §24).[55])

In further considering this point it is convenient to consider with it three cases which appellant cites for the proposition that SP and PFE were engaged in a joint venture.

Of course, a railroad if it elects to, may itself, with its own employees, provide icing service. But it is not required to and may employ an independent contractor (see the *Fruit Growers Exp. Case,* p. 26 above and compare the *El Dorado Case,* p. 27 above). If it elects to have this service provided by a third person the employees of that third person do not fall under the Federal Employers' Liability Act (the *Reynolds Case,* p. 36 above). We shall have occasion to return to this general consideration again and respectfully call attention to the cases dealt with under sub-head B below.

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52. A writing purported to make one person the agent of another but the court looked to the facts, found them "opposed to the terms of this agreement" and held that an agency was not created.

53. "In a great many places in the contracts, correspondence, and advertising matter, appellee and others similarly employed are referred to as agents; yet, of course, that designation is not controlling."

54. "The contract between the two companies calls the defendant the agent of the Fleet Corporation. This of course does not determine the matter."

55. "If an act done by one person in behalf of another is in its essential nature one of agency, the former is the agent of the latter, notwithstanding he is not so called. On the other hand, the mere use of the word 'agent' by the parties in their contract cannot be held to have the effect of making one an agent who, in view of the law under the evidence, is not such."

Oliver v. Northern Pac. Ry. Co., 196 Fed. 432 was a direct employment case. The decedent was a sleeping-car employee. The sleeping cars involved were **jointly owned and operated** by the railroad and the Pullman Company. The holding is simply that a person "employed jointly by a railroad company and another company in the operation and management of a train" is an employee of the railroad company under the Act. In the *Robinson Case,* 237 U.S. 84, 59 L.ed. 849, where "the case was not one of co-proprietorship," as in the *Oliver Case,* the Supreme Court reached a contrary result. For other sleeping-car company employee cases in addition to the *Robinson Case* and *Taylor Case* (p. 28 above—not the Express Company *Taylor Case*) see *Lindsay v. Chicago etc. Co.,* 226 Fed. 23 (C.C.A. 7), *Fowler v. Penn. R. Co.,* 229 Fed. 373 (C.C.A. 2) and *Eubanks v. So. Ry. Co.,* 244 Fed. 891. Compare the express company employee cases, p. 30 above.

In *Copper River etc. Co. v. Heney,* 211 Fed. 459, the Copper River Company owned a railroad and was a common carrier. The Katalla Company was its subsidary and the evidence showed that the subsidiary was actually operating the railroad. It transacted the business of the road, issued its own bills of lading and tickets and these stated that it was operating the railroad. Its resident engineer was unable to say who was operating. It was held that the Katalla Company was a common carrier by railroad. No other holding was possible in view of the express provision of the Federal Employers' Liability Act (45 U.S.C.A. §57) that the term "common carrier" as used in the Act includes all "persons or corporations

charged with the duty of the management and operation of the business of a common carrier." And the court expressly put its decision on this ground. The case can have no application here. PFE was not operating any railroad.

Linstead v. C. & O. R. Co., 276 U.S. 28, 72 L.ed. 453, simply applied under the Federal Employers' Liability Act the well-established rule governing the relation of a special servant to a special master. The case simply involved "the legal consequences of the relation between one in the general service of another who is in the special service of a third person." An employee in the general employment of one railroad was lent to another railroad—he was transferred to the special employment of the second railroad doing its business for it as its servant. The case has no application to an employee who is about his own master's business for his own master even though he may be doing that business on the line of a railroad. This is demonstrated by the Pullman and express cases. It is further demonstrated by *Hull v. Phila. & R.R. Co.,* 252 U.S. 457, 64 L.ed. 670 and the line of distinction is recognized by the *Linstead Case* itself for it distinguishes the *Hull Case* on this ground. In the *Hull Case* the Maryland Company and the Reading Company were connecting carriers, the Maryland Company operating from Hagerstown to Lurgan and the Reading Company from Lurgan to Rutherford. In actual operation, however, the Maryland Company operated its trains from Hagerstown through to Rutherford with its own crews. While on the rails of the Reading Company these Maryland crews were subject to the Reading Company operating rules. They were

nevertheless employees of the Maryland Company not the Reading Company. The court in the *Hull Case* pointed out that Hull had not been transferred from the employ of the Maryland Company and was its employee only.

> "It is clear that each company retains control of its own train crew; that what the latter did upon the line of the other road was done as part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, **this was for the purpose of coordinating their movements** to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the com panies."

This last thought was also expressed in the *Robinson Case* (the Pullman case), 237 U.S. 84, 59 L.ed. 849, where the court said:

> "The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company. **This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation.**"

Cf. *Stevenson v. Lake Terminal R. Co.*, 52 F.2d 357 (C.C.A. 6)[56];

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56. Like the *Hull Case*. The plaintiff had been employed by the defendant. Its tracks connected with the plant tracks of National Tube Company. The latter owned plant locomotives and did switching on its own plant tracks. Occasionally in doing this it was neces-

Docheney v. Penn. R. Co., 60 F.2d 808 (C.C.A. 3)[57];

Chicago etc. Co. v. Wagner, 239 U.S. 452, 60 L.ed. 379[58];

Douglas v. Washington Terminal Co., 298 F. 199 (C.A. of D.C.)[59];

Kentucky etc. Co. v. Minton, 167 Ky. 516, 180 S.W. 831.[60]

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sary for it to make movements over the defendant's main line. The plaintiff had been in the employ of the railroad company but in 1922, with other employees, was transferred to the employ of the Tube Company. While doing switching for it he was injured, as he claimed by reason of violation of a Safety Appliance Act, while on the defendant railroad's tracks and during the course of a move in which one of its engines had been lent to the Tube Company. *Held,* that he could not maintain an action against the railroad. Many of the cases with which we deal are discussed and it was held that the case was controlled by the *Hull Case.* The *Linstead Case* was distinguished. "In that case the work done was that of the defendant railroad, for which it was paid according to the standard tariffs." Again, the result was reached **although "the train, while on defendant's tracks, was subject to the orders of defendant's train master** as to signals for proceeding and the like."

57. On facts very like those in the *Stevenson Case,* the court distinguishes the *Linstead Case* and holds that the *Hull Case* is controlling.

58. Held, that a Burlington conductor could not be treated as an Alton employee because he was moving cars over Alton tracks under an arrangement between Burlington and Alton, on the authority of the *Robinson (Pullman) Case,* 237 U.S. 84, 91, 59 L.ed. 849, 851.

59. A terminal company switchman was killed in the course of switching moves on terminal company tracks. The Pennsylvania was one of the railroads using the terminal. The switching was of one of its trains and the locomotive making the move was a Penn locomotive handled by Penn enginemen. It was claimed that they were negligent. But they "were acting in the service and employment of the Pennsylvania Railroad, and not as employees of the Washington Terminal Company, although necessarily observing the signals and regulations of the latter company for the concurrent use of the station by the various companies."

60. Held, that the K. Ry. Co. could not be held under the Act for an injury received by an employee of the C. Co. while he was inspecting cars brought in by the K. Co. because he was not an employee of the latter.

A common carrier by railroad can, of course, employ independent contractors to perform various acts necessary for the operation of the railroad or to provide accessorial service to shippers and passengers as in the case of express matter or sleeping accommodations. Even where a railroad is under a duty to the public to do certain things and must see that they are done if it employs an independent contractor the employees of the independent contractor are not its employees. The railroad's duty to the public to see that a result is accomplished, where the public is not concerned with the way in which it is accomplished but merely that it is accomplished, must not be confused with the relation between the railroad and an independent contractor and the employees of the latter where the railroad elects to use an independent contractor instead of accomplishing the result with its own forces. The distinction between the carrier's duty to the public and its relation to an employee of an independent contractor performing some service for it was pointed out in the *Robinson (Pullman) Case.* The court noticed Section 5 of the Federal Employers' Liability Act and went on:

> "The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employees' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the railroad company within the meaning of the Act. It will be observed that **the question is not whether the railroad company, by virtue of its duty to passengers, of which it cannot divest itself by any arrangement with a sleeping-car company, would not be liable for the negligence of a sleeping-car porter** in matters involving the passengers' safety

(Pennsylvania Co. v. Roy, 102 U.S. 451, 26 L.ed. 141). Nor are we here concerned with the measure of the obligation of the railroad company, in the absence of special contract, to one in the plaintiff's situation by reason of the fact that he was lawfully on the train, although not a passenger. **The inquiry rather is whether the plaintiff comes within the statutory description**; that is, whether, upon the facts disclosed in the record, it can be said that within the sense of the Act, the plaintiff was an employee of the railroad company, or whether he is not to be regarded as outside that description, being in truth, on the train simply in the character of a servant of another master by whom he was hired, directed, and paid, and at whose will he was to be continued in service or discharged."

The same line of distinction was made in the *Magruder Case,* p. 64 below, where the court pointed out that the liability of a company undertaking to provide taxicab service to its passengers, in case of injury to the passenger, was wholly distinct from the question whether as between the company and the driver of the cab the driver was an employee or not. Compare, on the same general line of question, but not a common carrier case, *Bowman v. Pace Co.,* 119 F.2d 858 (C.C.A. 5). Of course, icing of railroad cars is a line of work for which an independent contractor can be employed (see *Fruit Growers Exp. Co.,* p. 26 above). And, indeed, a railroad may employ an independent contractor to perform services far more essential to the traditional conception of railroad business and absolutely indispensable if the business is to be conducted.

United States v. Silk, 331 U.S. 704, 91 L.ed. 1757 held that a common carrier by motor vehicle might employ an

independent trucker to perform its common carrier transportation functions and that the person so employed would not be its employee within the Social Security Act (holding as to Greyvan Lines). The *Bond Case,* p. 63 below, and *Polluck v. Minn. etc. Co.,* 40 S.D. 186, 166 N.W. 641, cert. den. 248 U.S. 558, 63 L.ed. 421 held that handling fuel and necessary supplies for the railroad might be put into the hands of an independent contractor and that in the event of injury in the course of doing the work so delegated the Federal Employers' Liability Act did not apply. Other cases to the same effect are cited in *Reynolds v. Addison Miller Co.,* supra.

Loading and unloading of freight can be handled for a carrier by an independent contractor and the employees of the latter do not become employees of the carrier. The *Drago* and *Bugg Cases* are noticed below at pp. 63, 64. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.ed. 1099 held a vessel liable to an employee of a stevedoring company upon a ground not based on employment and, while recognizing that the man was performing ship's service, made it clear that as to responsibility under the Longshoreman's Act, where the basis of liability is employment, the stevedoring company and not the vessel was the employer. Compare *United States v. Boyd-Campbell Co.,* 72 F.2d 40 (C.C.A. 5), *Wilson & Co. v. Locke,* 50 F.2d 81 (C.C.A. 2), *Schotis v. Stevedoring Co.,* 24 F.2d 591 and *Puget Sound etc. Co. v. Tax Com'n,* 203 U.S. 90, 82 L.ed. 68.

So the employees of an independent contractor are not employees of the railroad although the independent contractor is doing construction work on a cost-plus basis (*Campbell v. Jones,* 60 Wash. 265, 110 P. 1083), is procur-

ing rock for ballast from the railroad quarry (*Gogoff v. Ind. Com'n,* 77 Utah, 355, 296 P. 229), or is repairing and maintaining the railroad rolling stock and power (the *Klar Case,* p. 60 below and *Rexroad v. W. Md. Ry. Co.,* 162 Md. 566, 160 Atl. 730).

We pause here to notice the curious situation we should have in the case at bar if this were not the result. At Bakersfield, where plaintiff was working, PFE did icing not only for SP but also for Sunset and for Santa Fe. Is plaintiff a PFE employee or is he a SP employee when he is icing a car for it, a Sunset employee when icing a car for it and a Santa Fe employee when icing a car for the latter? Does his status shift from time to time depending on the work he is doing although he himself has no idea for whom he is icing a car? Is not this just the type of thing the 1939 amendment sought to avoid in the case of railroad employees? And what is his status when, as here, he is not icing a car for any carrier but is unloading ice to be held until such time as it may be needed and when it does not appear whether it was then assigned to go into any particular railroad car and does not appear that in fact it did go into an SP car? If a test is to be applied which would make plaintiff the employee of the common carrier by railroad which directly received the benefit of his service he cannot recover against SP because there is no showing that he was icing a car for SP.

B. 45 U.S.C.A. §55 Has No Application.

45 U.S.C.A. §55 provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any

liability created by this chapter, shall to that extent be void: * * *."

Appellant cites three cases to support the claim that this section applies. *State v. Bates etc. Co.,* 91 Wash. 181, 157 P. 482 was expressly disapproved in *Reynolds v. Addison Miller Co.,* 143 Wash. 271, 255 P. 110 (see p. 39 above). One case, *Erie R. Co. v. Margue,* 23 F.2d 669, probably correctly decided, goes on the foot of this section and the third, *Moore v. Ind. Com.,* 49 Ohio App. 386, 197 N.E. 403 uses it, probably incorrectly, as an alternative ground of decision.

The *Margue Case* is easy. The Erie Company had been maintaining its own right of way. A company was then organized by its employees formerly engaged in this work. The "company" had no equipment—everything was provided by the railroad—and it was to be paid on the basis of cost of labor and material plus five percent. Either party could terminate on thirty days notice and the railroad could terminate and take possession and control of the work on twenty-four hours notice. The company was a mere sham and the case was put on that ground—on the ground that "one of the purposes of its contract with the construction company was to avoid the liabilities of the Federal Employers' Liability Act." The court expressly distinguishes cases dealing with "the loading and unloading of cars with coal at a terminus, or the performance of a special service, such as express and sleeping-car companies perform, and which the railroad itself is not legally bound to perform." In the *Stevenson Case,* p. 53 above, decided by the same court, the *Margue Case* was distinguished.

In the *Moore Case* the railroad had leased its roundhouse and shop buildings, etc., to an outside concern which had contracted to maintain rolling equipment, power, etc. Unlike the concern in the *Margue Case* it was a legitimate, independent concern and financially responsible. One of its employees was injured while making emergency repairs on a locomotive. The court felt that it was bound to follow the *Margue Case,* if necessary, but did not really put the case on that ground and rather put it on the ground that the plaintiff, at the time he was injured, although in the general employ of the service company was the special servant of the railroad because the facts showed that at the moment of injury the plaintiff was doing special emergency work under the direct supervision of the railroad road-foreman of engines the court saying,

> "But leaving out of consideration the application of the decision in the Margue Case, there are facts in the case at bar which constituted plaintiff an employee of the Erie company at the time of his injury, notwithstanding his general employment by railway service company * * *. The plaintiff, being a loaned employee to the railroad company at the time of his injury, was not at the time of his injury an employee of the railway service company within the meaning of the Workmen's Compensation Act * * *."

Under the same contract between the Erie and the service company the contrary result was reached in *Klar v. Erie R. Co.,* 118 Ohio St. 612, 162 N.E. 793, cert. den. 279 U.S. 818, 73 L.ed. 975.

But whether the *Margue* and *Moore Cases* were decided correctly or not they can have no application here.

Historically, after the railroad business became established, the railroads undertook to supply tracks, motive power and what became conventional passenger and freight cars. With this equipment the railroads undertook, as carriers, under contract with various shippers or passengers to carry passengers and freight from place to place. In the case of freight the holding out was restricted primarily to carrying fairly bulky, comparatively low value, dead freight which did not need to be accompanied by a messenger or caretaker. This was the general character of the railroad business as such. As communication developed it became apparent that there was room for some special types of service. There were three types of such service which the railroads themselves never undertook to provide and they never became part of the traditional railroad business.

One of these special services was the supplying of sleeping accommodations. By and large, in this country, the providing of this service was by the Pullman Company. This long antedated the enactment of the Federal Employers' Liability Act in 1908. In the circumstances it is not surprising that the Supreme Court held that a contract, part of the necessary arrangements to coordinate the services of the Pullman Company with those of the railroad and to fix the position of Pullman Company employees, should be held valid under Section 5 of the Federal Employers' Liability Act. And this is the holding of the *Robinson Case,* 237 U.S. 84, 91, 59 L.ed. 849, 852.

The development of the express business has the same general history (see *The Express Cases,* 117 U.S. 1, 29 L.ed. 791; *Pfister v. Central Pac. R. Co.,* 70 Cal. 169, 179) —it was a special service not provided by the railroads

and traditionally undertaken by other persons. Again it was held (the *Taylor Case,* 254 U.S. 175, 186, 65 L.ed. 205, 212) that a contractual arrangement limiting the railroad's liability in the case of injury to an employee of the express company was not invalidated by Section 5 of the Federal Employers' Liability Act.

Historically, the situation is exactly the same where special service is provided by way of providing refrigerator cars and protective service. This appears, abundantly, from the facts which are before this Court. The service is one which the railroad could perform but, in the language of the *Fruit Growers Exp. Co. Case,* p. 26 above, there is no reason why this function "with respect to the furnishing of ice might not be performed by an independent contractor." In such circumstances it would be expected that if arrangements were made by a railroad with an independent concern under which the independent concern was to provide the icing service this would not be held to be a device void under Section 5 of the Federal Employers' Liability Act and this is exactly one of the points decided in the *Reynolds Case,* p. 36 above. The court notices the provisions of Section 5, says the first question is whether the plaintiff was an employee of a common carrier by railroad and goes on:

> "To answer this question, it is necessary to determine the effect of the contract between the Addison Miller Company and the Northern Pacific Railway Company. Under the authorities, that contract was valid and constituted the Addison Miller Company an independent contractor, and its employees would not be employees of the railway company in interstate commerce; nor would the Addison Miller Com-

pany itself be within the terms of the Federal Employers Liability Act."

The court cites and discusses the *Robinson Case,* the *Taylor Case,* the *Hull Case* and other cases which will be noticed below, including the *Bond Case,* 240 U.S. 449, 60 L.ed. 735.

Indeed, the cases have gone much farther than it is necessary to go here, and have held that a railroad may employ an independent contractor **to do things which are essential to and an integral part of the traditional railroad business** and that if they do the employees of such third persons are not employees of the railroad.

The holding of *Chicago etc. Co. v. Bond,* 240 U.S. 449, 60 L.ed. 735 can be shortly stated as it was stated in the *Reynolds Case:*

> "The contract in that case, between an interstate carrier and an independent employer of labor, involved the shoveling of coal on a per ton basis, the coal being shoveled from cars into chutes for the use of the railroad company's engines engaged in both intrastate and interstate commerce. It was held that the railroad company, having retained control of what should be done, but not having retained the right to direct how it should be done, was not liable to the employee of the independent contractor; and the court further held that the contract was not an evasion of the federal act and dismissed the action * * *."

The *Bond Case* itself considers the facts in much more detail and considers in detail the terms of the contract involved.

In *Drago v. Central R. Co.,* 93 N.J.L. 176, 106 A. 803, cert. den. 251 U.S. 553, 64 L.ed. 411 an independent

stevedoring company under contract was performing the traditional railroad work of transferring freight in transit from cars to lighters. The arrangement was held no evasion of Section 5 and it was held that employees of the stevedoring company were not employees of the railroad. This case and the *Bond Case* were followed to the same effect in *Bugg v. Sanders,* 219 Ala. 129, 121 So. 410, where the railroad company employed an outsider to perform the traditional railroad service of transporting freight from bad order cars to good cars so that the transportation could be continued.

There is nothing peculiar in the situation of UP or SP or PFE to make these considerations inapplicable. SP and UP have never undertaken, themselves, to provide special refrigerator cars or protective service. Before PFE began business the service had always been provided by third persons. Before 1907 it was determined to have this business handled and service provided by a Utah corporation, the stock of which would be owned by the two railroads. To this end PFE was organized in 1906 and began business in 1907. This arrangement antedated the Federal Employers' Liability Act of 1908 and obviously was not an attempt to evade the provisions of the statute which had not yet been enacted (cf. *Magruder v. Yellow Cab Co.,* 141 F.2d 324, 325 (C.C.A. 4)). Indeed, in this regard, it is interesting that even if plaintiff had been an employee of the railroad the Federal Employers' Liability Act would not have applied to him, in the work he was doing, before the 1939 amendment. Plaintiff at the time he was injured was not icing a car. He and other employees were working unloading ice to be stored and handled for future use. Before the 1939 amendment a

railroad employee doing this work would not have been engaged in interstate commerce and the Federal Employers' Liability Act would not have applied (*Shanks v. Del. L. & W. R. Co.,* 239 U.S. 556, 60 L.ed. 436; *Chicago etc. Co. v. Harrington,* 241 U.S. 157, 60 L.ed. 941; *Ill. etc. Co. v. Collins,* 241 U.S. 641, 60 L.ed. 1216; *Chicago etc. Co. v. Bolle,* 284 U.S. 74, 76 L.ed. 173; *Chicago etc. Co. v. Ind. Com'n,* 284 U.S. 296, 76 L.ed. 304; *N. Y. C. etc. Co. v. Bezue,* 284 U.S. 415, 76 L.ed. 370). And the facts in this case affirmatively show that the method and manner of providing reefer service and railroad protective service as of the time plaintiff was injured had "been used in the United States for many years and for many years long prior to 1939." Finally, PFE was no sham organization such as that in the *Margue Case.* The par value of its issued and outstanding stock was $24,000,000.00. Its net worth was more than $40,000,000.00. It owned more than 35,000 reefers. It conducted its own business through its own employees and with its own funds. It was in the car hire business as well as in the protective service business and as a consequence its activities extended all over the United States. In neither line of activity was it confined to contact with SP and UP. Its car hire business it conducted with all railroads. Its protective service business it conducted with many railroads other than SP and UP. It conducted its business in the same way that other car companies conducted their business.

With the situation of such magnitude and of such long standing if there had been any thought on the part of Congress that it was an evasion, or an attempt to evade, §5 or any other section of the Federal Employers' Liability Act, Congress, fully aware of the situation, certainly

would have dealt with it when it amended the Federal Employers' Liability Act in 1939. We need not repeat what is set out above.

It is argued that because **PFE** undertook to indemnify the railroads against liability for injury to its employees Section 5 of the Act is violated. This provision was intended to cover cases where an employee of PFE on PFE premises or as an invitee or licensee on railroad premises was injured by railroad operations and recovered in a common-law action. It is the normal type of provision when activities of two industries are closely associated. It can in no way serve as an argument for invalidity since it in no way affects any remedy of the employee and does not seek to relieve either PFE or the railroads of any liability to him. It is simply a method of adjusting the responsibility for satisfying a judgment between corporations themselves without in any way affecting the rights of third persons. The opinion below fully disposes of this point on this ground (R 84). Secondly, the argument attempts to lift itself by its own boot-straps. It assumes the Federal Employers' Liability Act applies. But it does not. And §5 can not apply where the Act as a whole does not.

C. Other Cases Cited.

Plaintiff has cited two California cases, *Southern Pacific Co. v. McColgan,* 68 C.A.2d 48, 156 P.2d 81, and *National Ice Company v. Pacific Fruit Express,* 11 C.2d 283, 79 P.2d 380. Both cases are tax cases and involve the construction and constitutionality of tax statutes. They do not have even remote bearing.

The question in the *Southern Pacific Case* was whether the California corporation and franchise tax reached dividends. This involved a number of questions, one of which was where the securities technically were held. One of the companies whose stock was held was PFE. It is interesting to notice that one of the facts relied on by the Court was that Southern Pacific Company "engaged in no activity with respect to the stocks here involved except the receipt and disbursement of dividends."

The *National Ice Case* is simpler. National Ice Company sold ice to PFE. The question was whether it could collect the California retail sales tax from PFE. It was held that it could not, that the tax was one imposed upon the seller and that, in the circumstances of this case, a provision of the statute attempting to shift the seller's tax on to the shoulders of the buyer was unconstitutional. The Court, by way of dictum, talked about whether the sale was a retail sale to which the tax would apply. The ice was for use in refrigerator cars. Obviously it was a retail sale. PFE was not going to use the ice for resale. It did not provide the ice to the railroad by selling it to them. There was no resale.

Appellant also cites *Cimorelli v. N. Y. C. R. Co.,* 148 F.2d 575 (C.C.A. 6) followed in *Penn. R. Co. v. Roth,* 163 F.2d 161 (C.C.A. 6). The *Roth Case* adds nothing to the *Cimorelli Case.* Both were cases in which the railroad, under contract with the government, undertook to operate a train and storage yard for the purpose of handling war materials in transit. In each case the railroad had a third person supply labor and equipment to do a part of the work but under the supervision, and at the direction, of the railroad. Each case held, on its peculiar facts, that a

laborer so supplied was an employee of the railroad under the Federal Employers' Liability Act. Compare, holding the other way, when the railroad did not retain control of the details the *Bond Case,* p. 63 above, the *Drago Case,* p. 63 above, and the *Bugg Case,* p. 64 above. The agreement in the *Cimorelli Case* had a provision that the supplier of labor and equipment should perform the work as an independent contractor but the Court held, as we argued above at p. 49, that such characterization did not control—that "neither the form of expression on the one hand, nor the name on the other, is conclusive."

> "The spirit and purpose of an agreement, as well as its letter, must be considered in the interpretation and application of a contract. What a contract is styled by the parties does not determine its character or their legal relation."

Accordingly, the Court reviewed the facts and found that the agreement with the Duffy Construction Company was only for unloading and loading the cars and that this was "the only part of the work delegated"; that the railroad had not "given up its proprietorship of the particular business to the Duffy Construction Company"; that the railroad superintendent determined the amount of work to be done, fixed the time and place of work and determined how much equipment had to be furnished and the number of persons to be employed; that the work was to be done in the railroad yard and no part of the premises was surrendered to Duffy; that the whole project involved interdependent details and the control of one could not be surrendered without disorganization of the whole; that the railroad superintendent had to approve in advance every

item of cost and the necessity of the purchase of equipment and the wages to be paid. The Court summarized the situation by saying that it was manifest "that through appellee's superintendent, full control over the means and manner of performance of the contract was reserved to appellee and that there was left in the contractor no independence." In the *Roth Case* the Court said that the situation "is substantially the same as it was in the *Cimorelli Case.*" Neither case has remote resemblance to the case at bar.

CONCLUSION

It is respectfully submitted that the trial court arrived at the only possible conclusion. This is so whether the case be considered in detail or in its broader aspects. The broader aspects are compelling. The business of PFE is one of the great industries of the country. The nature of this business and its relation to railroading were well-known to Congress. Congress adopted legislation regulating and affecting it in some aspects. Congress deliberately elected not to extend the Federal Employers' Liability Act to car companies and their employees. Rather, their employment being local, and not subject to the peculiar hazards of railroading—it involves office workers, shop workers, ice plant workers and loading dock workers but no railroad men—it elected not to differentiate these men from men doing substantially similar work in the same community but has left them to their remedy under the State Compensation Acts.

Dated at San Francisco, California, January 18, 1949.

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